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Supreme Court, U.S.
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No. 08 - 377

In The
SUPREME COURT OF THE UNITED STATES

Winston Trenchfield, (Agency No. 97-700-338)
Petitioner,
vs.
Michael B. Mukasey, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the 3rd Circuit has asserted that it lacked jurisdiction to adjudicate the Petitioner's challenge to the legal analysis of the Board of Immigration Appeals and its interpretation of both 8 USC section 1229(b)(B) and its precedential decision in *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2000) as the Court of Appeals determined that no legal or constitutional challenge was presented in the Petitioner's appeal and that it was without jurisdiction to adjudicate the Petitioner's factual and/or discretionary challenges. Petitioner presents this appeal to clarify the manner in which the jurisdictional provisions of the Real ID Act, which require that an alien appeal present legal and/or constitutional challenges in order to proceed on a petition for review, be interpreted by the Courts of Appeals, where the decision of the Board Of Immigration Appeals that is at the center of the alien's appeal presents a legal rationale with constitutional implications to the alien that would be sufficient for the appeal to proceed, but the Board's ultimate determination is one that is left up to the agency's discretion.

There is a conflict among the circuits as to whether 8 USC section 1252(a)(2)(B)(i) applies to challenges of agency determinations regarding statutory eligibility for discretionary relief, while some courts contend that any agency decision that involves the

agency's discretion at some point of the adjudication is properly classified as discretionary whereas other courts have drawn a distinction between the legal analysis that must be completed before the agency can exercise its discretion and the actual exercise of discretion by the agency. Other courts assert that 8 USC section 1252(a)(2)(B)(ii) permits judicial review in all cases except those in which the issue in question is left up to the pure discretion of the agency.

The question presented is:

I. Whether the Court of Appeals erred in asserting want of jurisdiction to adjudicate the Petitioner's petition for review because the ultimate issue involved a administrative decision regarding Petitioner's request for cancellation of removal and adjustment of status, discretionary forms of relief from removal, where eligibility to apply for those forms of relief is not discretionary, but rather statutory and the agency has set forth eligibility guidelines in its own precedential decisions, where the Petitioner has challenged the agency's statutory interpretation, as well as its application of its legal precedent and where the Petitioner asserts a constitutional violation on account of the agency's legal error?

CORPORATE DISCLOSURE STATEMENT

Winston Trenchfield is an individual and has no corporate involvement relevant to these proceedings.

TABLE OF CONTENTS

Question Presented .....i- iii
Corporate Disclosure iii
Table of Contents iv
Table of Authorities.....iv - v
Opinions Below 1
Jurisdiction 1
Statutory Provisions Involved 1-2
Parties To The Proceedings 2
Statement Of The Case 3-8
1. Federal Appellate background 3-4
2. Background In Administrative Proceedings ..4-8
Reasons for granting the Petition 8-15
Conclusion 16-17
Appendices .....A 1- A13

Table Of Authorities

Statutes:

Immigration and Nationality Act, 8 USC section 1182(a)(2)[also cited as INA section 212(a (2)] 13
Immigration and Nationality Act, 8 USC section 1227(a)(1)(A)[also cited as INA section 237(a)(1)(A)] 6
Immigration and Nationality Act, 8 USC section 1227(a)(1)(B)[also cited as INA section 237(a)(1)(B)] 5,8
Immigration and Nationality Act, 8 USC section 1227(a)(2)[also cited as INA section 237(a)(2)] 13

Immigration and Nationality Act, 8 USC section 1227(a)(2)(A)[also cited as INA section 237(a)(2)(A)] 5
Immigration and Nationality Act, 8 USC section 1227(a)(2)(E)(i)[also cited as INA section 237(a)(2)(E)(I)] 5, 6, 7, 8
Immigration and Nationality Act , 8 USC section 1229b .....i, 1, 4, 12-15
Immigration and Nationality Act, 8 USC section 1252(a)(2) .....i, ii, 2, 15, 17
28 USC section 1254(1) 1
18 USC section 2261A 8
Florida Statutes section 784.048(2) 5

Cases:

Accardi v. Shaughnessy, 347 US 260 (1954) 9
Cruz v. Attorney General, 452 F.3d 240 (3rd Cir. 2006) 9
Matter of Coelho, 20 I&N Dec. 464 (BIA 1992) 15
Matter of L-O-G, Int. Dec. #3281 (BIA 1996) 14
Matter of Velarde, 23 I&N Dec 253 (BIA 2002) ....i, 4, 9, 10, 12-15
Mendez-Moranchel v. Ashcroft, 338 D.3d 176 (3rd Cir. 2003) 16, 17
INS v. Woodby, 385 US 276 (1966) 14

Other Sources:

**Black's Law Dictionary*, Abridged Fifth Edition.....14
Federal Court Jurisdiction Over Discretionary Decisions After Real ID: Mandamus, Other Affirmative Suits and Petitions for Review, Mary

Kenney, *American Immigration Law Foundation*, April 5, 2006 16
On The Adequacy of Direct Review After the Real ID Act of 2005, Gerald L. Neuman, *New York Law School Law Review*, vol 51, 2006/2007, 133 - 158. 18

TABLE OF APPENDICES-

Appendix A - April 22, 2008 Decision of the US Court Of Appeals For the Third Circuit, ...(A-1 - A-2)
Appendix B - December 11, 2007 Decision of the Board Of Immigration Appeals, ...(A-3)
Appendix C- November 7, 2007 Decision of the Board Of Immigration Appeals, ...(A-4 - A- 13)

OPINIONS BELOW

The order of the Court of Appeals below on Petitioner's petition for rehearing, dated April 22, 2008 is unreported, as was the original order, dated December 11, 2007, both are reprinted at Appendices A and B, respectively. The opinion of the Board of Immigration Appeals, dated November 7, 2007 is reprinted at Appendix C.

JURISDICTION

The decision of the Circuit Court on Petitioner's Petition for Rehearing was entered on April 22, 2008. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

STATUTORY PROVISIONS INVOLVED

8 USC section 1229b
(b) Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents-

(1) In General-
The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is nadmissible or deportable from the United States if the alien-

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3)...; and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child, who is a citizen of the United States or an alien admitted for permanent residence...

8 USC section 1252(a)(2):

(B) Denials of Discretionary Relief- Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 or title 28 United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and **except as provided in subparagraph (D)**, and regardless of whether the judgement, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-

(i) any judgment regarding the granting or relief under section 212(h), 212(I), 240A, 240B, or 245...

(D) Judicial Review of Certain Legal Claims- Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section. (Emphasis added)

PARTIES TO THE PROCEEDINGS

Petitioner is Winston Trenchfield, a native and citizen of Jamaica, successfully appealed the determination of the immigration judge that his criminal offense subjected him to removal from the United States. Though not removable for a removable criminal offense, an order of removal was entered against the Petitioner as he was found to be in the United States with authorization and was not eligible for relief from removal. The Respondent is Michael B. Mukasey, the Attorney General of the United States.

STATEMENT OF THE CASE

1. Federal Appellate Background-

The US Court of Appeals for the Third Circuit dismissed the Petitioner's petition for rehearing as well as his underlying petition for review upon its determination that it had no jurisdiction to adjudicate Petitioner's appeal of the adverse determination of the Board of Immigration Appeals as it found that the Petitioner's challenge did not present a legal or constitutional challenge, but rather, was grounded upon matters left up to agency discretion and/or unreviewable factual determinations.

Petitioner's original petition for review asserted that the Board of Immigration Appeals failed to follow its own case law in its evaluation of the Petitioner's motion to reopen and remand for consideration of his applications for relief from removal. Petitioner asserted that the Board committed legal error in that

its adverse determination was contrary to its own established precedent, namely its decision in *Matter of Velarde*, (supra) and involved an erroneous interpretation of 8 USC section 1229b. Further, the Petitioner asserted that the Board's decision violated the Petitioner's right to due process as it failed to respect its own legal precedent and, thus, abused its discretion. It was on the basis of these challenges that the Petitioner asserted that the Court of Appeals had jurisdiction to adjudicate the appeal as the appeal was grounded upon the assertion of both legal and constitutional error.

In a decision rendered on or about December, 11, 2007, the Court of Appeals determined that the Petitioner's appeal was not grounded upon either constitutional or legal error, presented a challenge to the Board's factual determinations which were not subject to review and related to matters left within the agency's discretion. Accordingly, the Court of Appeals dismissed the appeal upon an asserted a lack of jurisdiction.

The Petitioner sought rehearing of the adverse determination of the Court of Appeals. On or about April 22, 2008, the Petitioner's request for rehearing was denied.

2. Background In Administrative Proceedings -

The Petitioner is Winston Trenchfield, a native and citizen of Jamaica. The Petitioner is married to Marnice Trenchfield, a citizen of the United States. Petitioner was admitted to the United States as a visitor on or about December 15, 1995 through Miami,

Florida. The Petitioner was permitted to remain in the United States until June, 1996. The Petitioner stayed beyond June 1996 and remained in the country without authorization.

The Petitioner's unlawful status was detected by the immigration authorities, and the Petitioner was placed into removal proceedings through issuance of form I-831, the notice to appear, on or about, December 2, 2005. The Respondent alleged that the Petitioner was convicted, on or about May 13, 1998 of stalking, in Dade County, Florida in violation of Florida statute 784.048(2). Additionally, the Respondent sought the Petitioner's removal on account of his failure to depart the United States upon the expiration of his visa, pursuant to 8 USC section 1227(a)(1)(B), on account of his alleged inadmissability due to his having committed a crime of moral turpitude, pursuant to 8 USC section 1227(a)(2)(A), and on account of his having been convicted of a stalking related crime, pursuant to INA section 1227(a)(2)(E)(i).

In the removal proceedings, the Petitioner denied the charges and allegations regarding his alleged criminal conduct and asserted that even if the allegations and charges of removal were valid, the Florida criminal offense would not support entry of a removal order against him. Specifically, the Petitioner asserted that the offense in question did not constitute a crime of moral turpitude and that the Florida stalking law in question was not analogous to any stalking offense criminalized under federal law. As such, the Petitioner asserted that conviction for the offense was

insufficient to subject him to removal from the United States.

The immigration judge dismissed the removal charge found under 8 USC section 1227(a)(1)(A) without prejudice, but sustained the charges relating to the stalking offense as well as the allegation that the Petitioner failed to depart the United States upon the expiration of his visa.

The Petitioner informed the court of his impending marriage to a citizen of the United States and requested a continuance so that the form I-130, petition for alien relative, could be filed on his behalf as well as an application for cancellation of removal. The immigration judge denied the Petitioner's request due to the fact that the Petitioner was not, at the time the request for the continuance was made, married to anyone who could file form I-130 on his behalf or anyone who could serve as a qualifying relative for the purpose of filing an application for cancellation of removal. Accordingly, the immigration judge entered an order of removal against the Petitioner on or about February 23, 2006.

The Petitioner filed a timely appeal of the decision of the immigration judge. The Petitioner presented a substantive legal challenge to the finding that his Florida conviction constituted a stalking offense and that he was removable for that conviction. Additionally, the Petitioner sought remand as he presented evidence of his marriage to a United States citizen that would entitle him to relief from removal in the form of cancellation of removal and/or adjustment of status. The Petitioner also submitted

documentation regarding the hardship his removal would present his wife as medical documentation regarding her condition was submitted. The agency filed no appeal regarding the rejection of its crime of moral turpitude removal charge.

On or about June 30, 2006, the Board Of Immigration Appeals, dismissed the Petitioner's appeal asserting that it agreed with the immigration judge that the Petitioner's Florida conviction was a removable offense and that it did not believe that the Petitioner's marriage possessed the necessary bona fides sufficient to entitle him to any form of relief. The Board rendered no finding regarding the Petitioner's eligibility for remand to apply for cancellation of removal or the hardship his removal would cause his wife.

The Petitioner filed a timely petition for review, and prior to the disposition of the appeal on the merits, the Respondent, through the office of the Assistant United States Attorney moved to remand the matter to the Board for further adjudication of the issue of whether the Petitioner's Florida conviction constituted a removable offense pursuant to 8 USC section 1227(a)(2)(E)(i). The Petitioner's request to return to the United States pending adjudication of the remanded proceedings was granted and the Petitioner was detained at the York County Prison pending the adjudication of the appeal by the Board.

In its November 7, 2007 decision, the Board determined that the Petitioner's Florida conviction did not constitute a removable offense as described at INA section 237(a)(2)(E)(i). In sum, the Board determined

that Congress did not intend to criminalize all types of stalking within its jurisdiction, thus it contended that the interstate stalking statute was not dispositive in its assessment of what constitutes the crime of stalking under the INA. The Board asserted that the commonly accepted definition of the term "stalking" is not necessarily reflected within the language of 18 USC section 2261A.

Having made those determinations, the Board found, with reference to the Florida statute, that the statute was divisible and that it targeted both conduct related to harassment as well as stalking. The Board determined that the section of the statute related to harassment qualified as a crime of stalking, but found that the records of conviction did not establish that this was the offense for which the Petitioner was convicted. Thus, the Board rejected the agency's assertion that the Petitioner was removable pursuant to 8 USC section 1227(a)(2)(E)(i).

The Board did determine, however, that the Petitioner was removable pursuant to 8 USC section 1227(a)(1)(B) as a person present in the United States in violation of law. With regard to that ground of removal, the Petitioner requested that the Board remand the proceedings to the immigration judge for further hearing regarding the Petitioner's eligibility for relief from removal in the form of cancellation of removal and adjustment of status due to his intervening marriage to a citizen of the United States.

The Board rejected the request for remand asserting that it was not convinced of the bona fides of the Petitioner's marriage, given the legal standard

set forth in *Matter of Velarde*, (supra) and thus, adjustment would be unwarranted. The Board also determined that the Petitioner's request for remand for consideration of his application for cancellation was unwarranted because the Petitioner did not provide convincing evidence that his removal would constitute an exceptional and extremely unusual hardship to his US citizen wife. Moreover, the Board asserted that it would not remand the proceedings to permit the Petitioner to seek cancellation relief because the application would not be granted as a matter of agency discretion due to the fact that the Petitioner had allegedly been convicted of Manslaughter in Canada in December 1978. Further, the Board determined that it was an adverse factor that the Petitioner's his wife indicated in an affidavit filed with the immigration court that she once obtained a restraining order against the Petitioner, the Petitioner was once charged with contempt of court and he had a conviction for stalking.

The Petitioner again filed a petition for review seeking to challenge the adverse legal determination of the Board as well as to present a claim that he had been deprived of due process of law in the administrative proceedings due to the Board's legal error. The Petitioner's appeal was dismissed on or about December 11, 2007 and his request for rehearing was denied on or about April 22, 2008.

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred in its determination that inasmuch as the ultimate decision as to whether

to grant the Petitioner's applications for cancellation relief and/or his request for adjustment of status were matters left up to agency discretion and the Petitioner's challenge to the Board's assertion that he had been convicted of manslaughter in Canada was a non-reviewable factual determination by the agency, it was without jurisdiction to adjudicate his appeal irrespective of the fact that the Petitioner claimed both legal and constitutional error by the agency in his petition for review. The Court of Appeals had full jurisdiction to adjudicate the Petitioner's appeal, notwithstanding the jurisdictional restraints imposed by the Real ID Act, because the Petitioner asserted that the agency misinterpreted a statute, namely 8 USC section 1229b, as well as its own precedential decision, *Matter of Velarde*, which are inherently legal challenges to the agency determination. Further, inasmuch as the agency failed to respect its own precedential decision and misinterpreted the Congressional statute, the Petitioner asserted that his right to due process in the removal proceedings was violated.

ARGUMENT

Where Constitutional issues are raised, they are fully within the jurisdiction of the Courts Of Appeals to consider. *Cruz v. Attorney General*, 452 F.3d 240 (3rd Cir. 2006)

An agency that fails to follow its own rules and regulations in the adjudication of a litigant's rights with respect to issues within its jurisdiction has

denied the litigant a fundamentally fair hearing and has violated the due process rights of that individual. *Accardi v. Shaughnessy*, 347 US 260 (1954).

Though the Court of Appeals determined that there were no legal or constitutional issues raised in the Petitioner's petition for review, and that issues related to the Board's consideration of the agency's assertion that the Petitioner had a prior conviction for manslaughter in Canada was not sufficient to confer jurisdiction over the appeal, that determination was not supported by the documents of record. The relevant documents establish clearly that the Board's determination regarding the Petitioner's eligibility for relief were made, primarily, based upon its legal analysis of the applicability of its decision in *Matter of Velarde*, (supra) and its interpretation of 8 USC section 1229b(b)(1). Inasmuch as the Petitioner's appeal challenged the Board's legal analysis and asserted that his right to due process had been violated as the result of the Board's error, the appeal raised both legal and constitutional challenges and the Court of Appeals had jurisdiction to adjudicate the appeal.

The Board's determination that the Petitioner was ineligible for relief from removal ignored its decision in *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2000). Specifically, the Petitioner asserted that the Board failed to state what documents the Petitioner failed to submit that were required by *Velarde*. As in *Velarde*, the Petitioner submitted his relief applications, marriage certificate, as well as a statement from his wife regarding their life together. In addition to these documents, the Petitioner submitted a copy of the

affidavit of support that his wife filed on his behalf. The affidavit of support is a document filed by a family member or friend of a person seeking relief and/or release from agency custody. The document has legal consequences inasmuch as the person submitting the document enters into a contract with the agency by providing assurances that the signatory will assume all financial responsibility for the alien for whom the affidavit of support is submitted.

Additionally, the Petitioner submitted his wife's medical records that outlined her multiple medical problems .

In its assertion that the Petitioner's evidence was insufficient, the Board provided no explanation as to why the evidence, which was of the same type required to be submitted by the alien in *Velarde* and deemed sufficient in that case to establish the bona fides of that alien's marriage, yet was insufficient to establish the bona fides of the Petitioner's marriage. Additionally, the Board failed to discuss why the fact that the Petitioner's wife submitted an affidavit of support on his behalf was not relevant in its assessment of the bona fides of the Petitioner's marriage.

Similarly, the Board erred with respect to its assessment of the Petitioner's eligibility for cancellation of removal. The statutory eligibility requirements for cancellation of removal for non permanent residents are set forth at 8 USC section 1229b. The Petitioner asserted that he was statutorily eligible for cancellation relief as he was not an alien who has been convicted of any offense referred to in 8

USC section 1182(a)(2), or one that renders him removable from the United States under 8 USC section 1227(a)(2). Thus, the Petitioner asserted that inasmuch as the statute only required that the Petitioner establish that he did not have any of the prohibitive convictions and that he has a qualifying relative, he was prima facie eligible for cancellation and the matter should be remanded to permit adjudication of his application.

Petitioner has a qualifying relative, namely his US citizen wife Marnice, who has asserted that she will suffer great hardship upon the Petitioner's removal due to her incapacitating medical condition, the evidence of which was submitted to the Board. Further, the Petitioner is the father of a minor United States citizen child. Moreover, the Board made no determination that the Petitioner is a person without good moral character nor did it make any finding that the Petitioner has failed to meet the continual presence requirement. [See 8 USC section 1229(b)]

The Board determined that the Petitioner was not prima facie eligible for cancellation relief because he failed to show that his removal would represent an exceptional and extremely unusual hardship for his US citizen wife due to the short duration of their marriage, the entry into the marriage subsequent to the adverse decision of the immigration judge and subsequent to the Petitioner's placement into immigration detention. The Petitioner presented a legal challenge to the prima facie determination of the Board as he asserted that the determination was contrary to the Board's decision in *Velarde* (supra).

Specifically, the Petitioner challenged the determination of the Board regarding the presentation of an exceptional and extremely unusual hardship requirement under 8 USC section 1229b. The Petitioner's wife submitted medical records regarding the extent and nature of her condition, she also submitted a statement indicating that she has endured economic and other hardships as the result of the Petitioner's detention and removal. Addition to this evidence, the Petitioner's wife submitted the affidavit of support referenced above as well as the other documents required by the *Velarde* (supra) decision. The Petitioner asserted that the Board applied the wrong legal standard to its assessment of whether the Petitioner presented sufficient evidence of his prima facie eligibility for cancellation of removal.

Black's Law Dictionary defines the term "prima facie evidence" in the following way:

"Evidence good and sufficient on its face." (*Black's Law Dictionary*, Abridged 5th Edition) Presentation of prima facie evidence does not require the Petitioner to meet the clear and convincing evidence standard as required in *INS v. Woodby*, 385 US 276 (1966). The Petitioner noted that the Board's own precedential decisions make clear that a litigant seeking to present a prima facie case is not obligated to establish that s/he will ultimately prevail. *Matter of L-O-G*, Int. Dec. #3281 (BIA 1996). Thus, the fact that the Petitioner ***might*** ultimately not be deemed to be deserving of the agency's favorable exercise of discretion, following a full hearing on the application, did not permit the Board to deny the request for

remand on the basis of a discretionary determination it was not yet authorized to make.

Further, the Petitioner asserted that though the Board cited its decision in *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) as support for its adverse determination, it ignored the underlying requirement of *Coelho*, namely that the evidence supporting the request for relief be viewed in its entirety, and not upon the piecemeal basis applied by the Board in this case.

Importantly, inasmuch as the Petitioner asserted that he presented both a sufficient challenge to the Board's determination that he failed to comply with the legal requirements of *Matter of Velarde*, (supra) and asserted that he established his prima facie eligibility for cancellation relief as set forth at 8 USC section 1229b(b)(1), the Petitioner asserted that the Board violated his right to due process in refusing to remand the proceedings to the immigration court for consideration of his applications for relief from removal.

The Courts of Appeals are in conflict as to when the provisions of 8 USC section 1252(a)(2)(B)(i) permit judicial review and when they do not. At least 10 Courts of Appeals have found that where the issue at question is not one left up to the agency's discretion, judicial review is permitted.[1] The Fourth Circuit

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[1] See *Singh v. Gonzales*, 413 F.3d 156 (1st Cir. 2005); *Sepulveda v. Gonzales*, 407 F.3d 59 (2nd Cir. 2005); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Santana-Albarran v Ashcroft*, 393 F.3d 699 (6th

was the last to address this issue.[2] This issue was addressed by the US Court of Appeals for the Third Circuit in *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176 (3rd Cir. 2003). In that decision, the court of appeals stated: "We join the other circuits[3] and conclude that , for nondiscretionary factors, the Court

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Cir. 2005); *Morales- Morales v. Ashcroft*, 384 F.3d 418 (7th Cir. 2004); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610 (8th Cir. 2005); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002); *Schroeck v. Gonzales*, 429 F.3d 947 (10th Cir. 2005); *Gonzales-Oropeza v. US Attorney General*, 321 F.3d 1331 (11th Cir.2003).

[2]See, "Federal Court Jurisdiction Over Discretionary Decisions After Real ID: Mandamus, Other Affirmative Suits And Petitions For Review", Mary Kenney, *American Immigration Law Foundation*, April 5, 2006, at page 6, footnote 9.

[3]The Court referenced the decision of the United States Court of Appeals for the Ninth Circuit in *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002) (which permitted review as the agency determination went to statutory eligibility not discretion) and the decision of the US Court of Appeals for the Seventh Circuit in *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002)(finding that 8 USC section 1252(a)(2)(B) only bars jurisdiction of federal courts to review agency determinations that are purely discretionary.

maintains jurisdiction, but as to discretionary decisions, we lack jurisdiction."[4]

It is important to note that the *Mendez-Moranchel* (supra) case differs from the Petitioner's case in that there, the alien was not seeking remand for full adjudication of his application as is the Petitioner here. There, the alien received a full hearing on the merits of his application and the agency determined that, as a matter of its discretion, it could not find that the alien's case presented an exceptional and extremely unusual hardship. Here, the agency purported to make such a determination for this Petitioner, without the benefit of a full hearing, when the governing statute merely required that he present a prima facie claim for statutory eligibility for cancellation relief. That the agency's adverse adjudication of matters related to statutory eligibility strip federal courts of jurisdiction under 8 USC section 1252(a)(2)(B) is not at all clear. The American Immigration Law Foundation asserts 8 USC section 1252(a)(2)(D), "...codifies for purposes of petitions for review the court decisions that held that section 242(a)(2)(B) did not apply to statutory eligibility issues and similar questions of law... [5] Moreover, other commentators have asserted that 8 USC Section 1252(a)(2)(D) permits federal court review over legal and constitutional challenges to agency determinations even when those

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[4]Id at pages 5-6 of 7.

[5]"Federal Court Jurisdiction Over Discretionary Decisions After Real ID:...", supra, at page 10

determinations involve the denial of discretionary benefits.[6]

Accordingly, the Court of Appeals determined incorrectly that it lacked jurisdiction to consider the Petitioner's petition for review because the Petitioner failed to assert a legal or constitutional issues sufficient to permit the court to acquire jurisdiction to adjudicate the appeal. The issue of the Petitioner's statutory eligibility for cancellation relief was a legal determination, not a discretionary one. Further, the Petitioner had the right to raise a due process challenge to the agency's decision to purport to adjudicate the merits of his relief applications when he was only obligated to present prima facie level evidence regarding his eligibility for relief. Accordingly the Court of Appeals erred in asserting that it lacked jurisdiction to adjudicate the Petitioner's appeal.

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[6]On The Adequacy of Direct Review After the Real ID Act of 2005, Gerald L. Neuman, *New York Law School Law Review*, vol 51, 2006/2007, page133, 137.

CONCLUSION

The decision rendered by the Court of Appeals for the 3rd Circuit below highlights the disparate manner in which the jurisdictional provisions of the Real ID Act, which require that an alien appeal present legal and/or constitutional challenges in order to proceed on a petition for review, have been interpreted by the Courts of Appeals. Though the courts tend to agree that there is no jurisdiction to consider discretionary or purely discretionary challenges, there is sufficient disagreement and uncertainty as which agency determinations are discretionary and which involve legal issues. Further, there is uncertainty as to whether an agency determination is properly deemed to be discretionary where the legal challenge raised on appeal doesn't involve a discretionary finding of the agency, but the agency made discretionary determination during the administrative proceedings or whether discretionary and non-discretionary determinations in a proceeding can be bifurcated such that the reviewing court's lack of jurisdiction as to one determination does not impact its jurisdiction as to the other.

In view of the centrality of the Real ID Act to the jurisdictional authority of Courts of Appeals to adjudicate alien appeals, the issues raised herein are of significant importance and should be resolved by this court. Accordingly, this petition for writ of certiorari should be granted.

Sincerely,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

07-4462

WINSTON TRENCHFIELD,
Petitioner,
V.
ATTORNEY GENERAL OF THE
UNITED STATES,
Respondent

PRESENT: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENBERG, NYGAARD*
Circuit Judges

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judge who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing,

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* Judges Greenberg and Nygaard's votes are limited to panel rehearing only.

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Theodore A. McKee
Circuit Judge

DATED: April 22, 2008
lwc/cc: Sandra L. Greene, Esq.
Ada E. Bosque, Esq.

APPENDIX B A-3

*AMENDED ELD-8-E December 11, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 07-4462

WINSTON TRENCHFIELD

v.

ATTORNEY GENERAL OF THE UNITED STATES
(Agency No. A97-700-338)

Present: MCKEE, GREENBERG and *NYGAARD, Circuit Judges

Submitted are:

(1) Petitioner's Motion for Stay of Removal; and
(2) Respondent's Opposition to Motion For Stay of Removal in the above-captioned case.

Respectfully,
Clerk.

MMW/CAD.lwc

ORDER

This Court lacks jurisdiction to review discretionary decisions under 8 USC section 1229b absent an allegation of legal or constitutional error. Mendez-Reyez v. Attorney General, 428 F.3d 187, 189 (3rd

Cir. 2005). Petitioner's argument that the BIA erred in considering manslaughter charges that had been dismissed does not rise to that level. Rather, if the BIA erred in considering a charge that had been dismissed, it would have made a mistake of fact, not an error of law.

Accordingly, the Motion to Stay Removal and Petition for Review is dismissed for lack of jurisdiction.

APPENDIX C A-5

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 220412

File: A97-700-338 York Date: NOV 7, 2007

In re: WINSTON TRENCHFIELD

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Sandra Greene, Esquire

ON BEHALF OF DHS: William Lore
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. section 1227(a)(1)(A)]- Inadmissible at time of entry or adjustment of status under section 212(a)(2)(A)(i)(I), I&N Act [8 USC section 1182(a)(2)(A)(i)(I)]- Crime involving moral turpitude Crime involving moral turpitude

Sec. 237(a)(1)(B), I&N Act [8 U.S.C.

section 1227(a)(1)(B)]- In the United States in violation of law

Sec. 212(a)(2)(E)(i), I&N Act [8 U.S.C. section 1227(a)(2)(E)(i)]- Convicted of crime of domestic violence, stalking, or child abuse, neglect or abandonment

APPLICATION: Remand

The respondent is a 50-year old native and citizen of Jamaica. On February 6, 2006, the respondent was served with a Notice to Appear alleging that he was admitted to the United States on or about December 15, 1995, as a nonimmigrant with authorization to remain until June 15, 1996; that he remained in the United States beyond that date without authorization; that on December 18, 1978, he was convicted of manslaughter in violation of Canadian Criminal Code section 232; and that on May 13, 1998, he was convicted of stalking in violation of section 784.048(2) of the Florida statutes. The respondent was charged with being subject to removal under section 237(a)(1)(A) of the Immigration and Nationality Act, 8 USC section 1227(a)(1)(A), as an alien who was inadmissible at the time of entry for having been convicted of a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, 8 USC section 1182(a)(A)(i)(I); under section 237(a)(1)(B) of the Act as an alien who remained in the United States longer than permitted; and under section 237(a)(2)(E)(i) of the Act as an alien convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, chid neglect, or child abandonment. At a February 23, 2006, hearing, the respondent, through counsel, admitted that he is a native and citizen of Jamaica who entered the United States on or about December 15, 1995, as a nonimmigrant with permission to remain until June 15, 1996, but denied that he has remained beyond that date without authorization, denied the criminal convictions, and denied the charges of removal. The respondent asserted that although the

offense for which he was convicted in Florida is termed a stalking offense, the conduct prohibited by that statute is not akin to what Congress contemplated when it made a "crime of stalking" a removable offense.

In his decision, the immigration judge found the respondent removable under sections 237(a)(1)(B) and 237(a)(2)(E)(i) of the Act, but dismissed without prejudice the section 237(a)(1)(A) removal charge. dditionally, the immigration judge denied the respondent's request for a continuance to allow him an opportunity to marry his United States citizen girlfriend, have a visa petition filed on his behalf , and apply for adjustment of status.

On appeal, the respondent asserted that his conviction for stalking under section 784.048(2) of the Florida statutes does not render him removable under section 237(a)(2)(E)(I) of the Act as an alien who has been convicted of a stalking crime because the Florida statute criminalizes merely "following" someone and does not require any physical contact between the perpetrator and victim. Additionally, the respondent asserted that the record should be remanded to allow him to apply for cancellation of removal because he married a United States citizen on May 26, 2006, has resided continuously in the United States for at least 10 years, and can establish good moral character and his wife has serious medical problems such that his removal would "constitute a hardship to him." Additionally, the respondent submitted a motion to

remand to allow him to apply for adjustment of status based on his marriage and his consent to file a visa petition on his behalf. The respondent proffered with his motion a copy of the visa petition and marriage certificate, medical records for his wife, and a form G-325A (Biographic Information). The Department of Homeland Security (DHS) indicated its opposition to a remand of the proceedings where there was no indication that the visa petition completed by the respondent's wife had actually been filed, the respondent failed to comply with *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), and the respondent does not warrant a favorable exercise of discretion due to his convictions for stalking and manslaughter.

In our decision of June 30, 2006, we adopted and affirmed the immigration judge's decision. Additionally, we found a remand unwarranted where the respondent failed to comply with *Matter of Velarde*, supra, and also neglected to submit a completed adjustment application. In an order dated May 10 2007, the United States Court of Appeals for the Third Circuit remanded this case back to the Board in order for the Board to address the issue of whether a conviction under section 748.048(2) constitutes a "crime of stalking" pursuant to section 237(a)(2)(E)(i) of the Act.

In his brief on remand, the respondent asserts that Congress intended that the term "stalking" have the same meaning in section 237(a)(2)(E)(i) as it is given in the federal statute which criminalizes interstate

stalking, 18 USC section 2261A. The respondent points out, inter alia, that Congress was aware that when it made stalking a removable offense in September 1996 that it had, only days earlier, added 18 USC section 2261A to the United States Code, which sets forth the elements of the federal criminal offense of stalking. Therefore, he contends that Congress intended that the term"stalking" be given the same meaning in section 237(a)(2)(E)(i) of the Act as that which is set out in 18 USC section 2261A. We disagree.

First, if Congress had intended 18 USC section 2261A to provide the definition for stalking, it could have included a reference to this statute in section 237(a)(2)(E)(i) of the Act. Congress did refer to another criminal statute in the same provision, specifically in defining "crime of domestic violence," but it opted not to include a specific reference for stalking. We find this lack of a reference to be significant. *See, e.g. INS v. Cardozo-Fonseca*, 480 US 421, 432 (1987)(finding that when Congress includes particular language in one section but omits it from anoterh, it is presumed that Congress acted intentionally and purposefully); *cf. United States v. Yanez-Saucedo*, 295 F3d 991 (9th Cir. 2002) 295 F. 991 (9th Cir. 2002)(finding that specific language of section 101(a)(43)A) of the Act is directly at odds with finding that federal sexual abuse laws govern what constitutes rape for this provision); *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999) (rejecting the suggestion that the federal sexual abuse

laws limit the class of state laws that can be found to punish "sexual abuse of a minor" for purposes of section 101(a)(43)A) of the Act).

In addition, the legislative history of 18 USC section 2261A shows that Congress did not set out to criminalize all types of stalking within its jurisdiction when it first drafter the provision. The House version of the National Defense Authorization Act for Fiscal Year 1997 did not include any reference to stalking, and the Senate version only criminalized the stalking of members of the armed forces. In conference, the House receded to the Senate's version by adding what became 18 USC 2261A, a provision criminalizing interstate stalking and stalking on federal property. See HR Conf. Rep. No. 104-724. This history indicates that the interstate stalking statute is not dispositive regarding what constitutes the crime of "stalking" under section 237(a)(2)(E)(i) .

Finally, as we stated in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), Congress' amendments to section 237(a) and to section 101(a)(43) of the Act in 1996 evidenced an intent to create a comprehensive scheme to cover crimes against women and children. Section 2261A of Title 18 of the United States Code, however, includes a requirement that is more restrictive than the majority of state laws governing stalking. Specifically, 18 USC section 2261A requires that an individual cause the victim to fear death or serious bodily injury. Most state statutes, on the other hand, require only a fear of bodily injury.

See 2 Subst. Crim. L. 16.4 (discussing model stalking law drafted by National Criminal Justice Association and stating that "[m]ost of the state stalking statutes also particularize what it is that the victim must fear, and when this is done, it is universally agreed that a fear of [bodily] injury will suffice"). Given this fact, we cannot conclude that 18 USC section 2261A reflects the commonly understood meaning of the term "stalking" or that it embodies the crime Congress intended to cover in section 237(a)2)(E)(i) of the Act.

Having determined that 18 USC section 2261A does not provide the definitive definition for the crime of stalking in section 237(a)(2)(E)(i) of the Act, we still must resolve the issue of whether a conviction under section 784.048(2) of the Florida criminal statutes is a "crime of stalking" for the purpose4s of establishing the respondent's removability under that section of the Act. Section 784.048(2) provided, in pertinent part, that"[a]ny person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor of the first degree."[7] Section 784.048(1)(a) states that harass" means to "engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose." "Course of conduct"

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[7]With respect to the comments in the respondent's brief about "cyberstalking", we point out that cyberstalking was not added to the statute until several years after the respondent's conviction.:

means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." Section 784.048(1)(b). Although the word "maliciously" is not defined in the statute, the District Court of Appeals of Florida, Fourth District, has indicated, with respect to similar language contained in section 784.048(4) of the Florida statutes (aggravated stalking), that the plain meaning of the statutory term "maliciously" is legal malice, i.e. "Wrongfully, intentionally and without legal justification." *Seese v. State*, 955 S.2d 1145 (Fla. App.4 Dist., 2007).

Section 784.048(2) is a divisible statute. An individual may be convicted for a violation of section 784.048(2) of the Florida statutes if he is found to have willfully, maliciously (wrongfully, intentionally and without legal justification), and repeatedly harassed (engaged in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose) another person. A conviction under section 784.048(2) of the Florida statutes may also be had if a person is found to have willfully, maliciously, (wrongfully, intentionally and without legal justification)and repeatedly followed another person.

The respondent asserts that the Florida statute requires a low level of culpability because an individual can be convicted for displaying one of two levels of mens rea: willful or malicious. The statute's requirement that the individual act "willfully,

maliciously, and repeatedly " indicates that the individual must act willfully and maliciously to be in violation of the statute. The respondent states that the portion of the statute which criminalizes willfully, maliciously, and repeatedly "following" someone is much broader than most state statutes which criminalize stalking, as it neither requires proof that a reasonable person would fear bodily injury (or worse) or that the conduct causes alarm or emotional distress to the victim. Indeed, the "following" portion of Florida's stalking statute does not require that the victim apprehends any danger posed by the offender's conduct or is even aware of the "following".

The word "stalking" has not been given a single, accepted meaning by the state legislatures. The criminal codes of the states define stalking in many different ways. *Cf. Taylor v. United States*, 495 US 575, 580 (1990) (noting that states have defined burglary in many different ways). However, some elements that are present in most state stalking statutes include either conduct that causes alarm or emotional distress in the victim and/or conduct that produces a fear of physical harm. The respondent is correct that a large number of state stalking statutes require conduct, a threat, or an intent to make the victim, or which would make a reasonable person, fear for their (or a close family or household member's) physical safety or, in some states, even fear death or serious bodily injury to themselves or a family member. See Ala. Code section 13A-6-90; Alaska Stat. section11.41.270; Ariz. Rev. Stat. Ann. Section 13-2923(a)(1); Ark.

Code Ann. Section 5-71-229(b)(1); Cal. Penal Code section 646.9; Conn. Gen. Stat. sections 53a-181d- and 181e; 720 Ill. Comp. Stat. Section 5/12-7.3(a) (future bodily harm, sexual assault, confinement, or restraint); Iowa Code section 708/11(2); Kan. Crim. Code Ann. Section 21.3438(a);Ky. Rev. Stat. Ann. section 508.150; Md. Code Ann., [Crim. Law] section 3-802; Miss. Code Ann. section 97-3-107; N.H. Rev. Stat. Ann. 633: 3-a; N.J. Stat. Ann. section 2C:12-10; Va. Code Ann. section 18-2- 60.3. Other states require conduct or an intent which causes the victim, or would cause a reasonable person, to feel alarmed or to suffer emotional distress. See La. Rev. Stat. Ann. Section 14:40.2; Mo. Rev. Stat. Section 565.225; Nev. Rev. Stat. Section 200.575(1) (conduct which would cause a reasonable person to feel "terrorized, frightened, intimidated or harassed"); N.D. Cent. Code section12.1-17- 07.1(conduct..."which frightens, intimidates or harasses that person" and would "cause a reasonable person to experience fear, intimidation or harassment"); Okla. Stat. Tit. 21 section 1173; Tenn. Code Ann. Section 39-17-315; Wyo. Stat. Ann. Section 6-2-506. Other state stalking statutes require conduct, a threat, or an intent to make the victim, or which would make a reasonable person, suffer alarm or emotional distress or fear for their (or a close family or household member's) physical safety. Colo. Rev. Stat. Section 18-9-111(4)(b)(I) and (III); Idaho Code Ann. section 18-7906(1); Me. Rev. Stat. Ann. Tit. 17-A, section 210A; Mich. Comp. Laws section 750.411h; Mont. Code Ann. Section 45-5-220; N.C. Gen. Stat. Section 14-277.3; 18 Pa. Cons. Stat. Ann.

section 2709.1; R.I. Gen. Laws section 11-59-2; Utah Code Ann. section 76-5-106.5; Vt. Stat. Ann. Tit. 13, section 1061. Still other states require conduct, a threat, or an intent to cause the victim, or which would cause a reasonable person, to suffer alarm or emotional distress *and* also fear for their (or a close family or household member's) physical safety. Ga. Code. Ann. Section 16-5-90; Mass. Gen. Laws ch. 256. section 43; N.M. Stat. section 30- 3A-3; Or. Rev. Stat. Section 163.732; Wis. Stat. section 940.32.

From a review of the above, we agree with the respondent that the portion of Florida's stalking statute which provides that "[a]ny person who willfully, malicious, and repeatedly follows...another person commits the offense of stalking" is broader than conduct criminalized by the great majority of state stalking statutes. Indeed, we could find only one other state stalking statute that tracks the language of the Florida statute, requiring only a finding that the accused did "[w]illfully, maliciously and repeatedly follow or harass another person" for a conviction under that statute. S.D. Codified Laws section 22-19A-1. On the other hand, that portion of Florida's statute which criminalizes willfully, maliciously, and repeatedly follow or harass another person, and which requires that such conduct cause substantial emotional distress in the victim, contains elements which are shared by stalking offenses in many other states. Accordingly, we find that the "harassment" portion of Florida's stalking statute, at least, can be ategorized as a crime of stalking under section 237(a)(2)(E)(i) of

the Act.

However, we find that the term "stalking" found at section 237(a)(2)(E)(i) of the Act does not encompass that portion of the Florida statute which criminalizes willfully, maliciously, and repeatedly following someone. As noted above, the section of the Florida statute which prohibits following someone, without the necessity of showing any emotional distress or fear of bodily harm, is not only broader than the definition utilized by Congress at 18 USC section 2261A to criminalize interstate stalking, but is also broader than almost all other state stalking statutes. Moreover, the addition of crimes of stalking as a ground of removal must be read in pari materia with the other crimes enumerated in that section, which include crimes of domestic violence and crimes of child abuse, child neglect, and child abandonment. As noted earlier, Congress' amendments to sections 101(a)(43) and 237(a) of the Act in 1996 evidenced an intent to create a comprehensive scheme to cover crimes against women and children. *Matter of Rodriguez-Rodriguez*, supra, at 996; *see Guerrero-Perez v. INS*, 242 F.3d 727, 736 (7th Cir. 2001) (noting that when Congress broadened section 101(a)(43)(A) of the Act to include rape and sexual abuse of a minor, it was "implicitly signaling that it felt both of these latter two crimes were of similar severity and import"). We are not convinced that a criminal statute that is broader than a generic stalking offense because it criminalizes repeatedly following someone and is not of a "similar severity and import" as the other offenses enumerated

in section 237(a)(2)(E)(i) of the Act is a "crime of stalking" within the meaning of section 237(a)(2)(E)(i) of the Act.

Because we find that only that portion of section 784.048(2) of theFlorida statutes which criminalizes willfully, maliciously, and repeatedly harassing another person can be categorized as a "crime of stalking" within the meaning of section 237(a)(2)(E)(i) of the Act, we must look to the specifics of the respondent's conviction to determine whether he was convicted under that portion of the statute which criminalizes following another person or that which forbids harassing another person. Generally, in determining whether an alien's conviction for a criminal offense renders him subject to removal, the court will look to the elements and the nature of the offense of conviction, subject to removal, the court will look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to the alien's crime. *Leocal v. Ashcroft*, 543 US 1,7 (2004). However, a statute, such as the one at issue, which is phrased in the disjunctive, "will...invite inquiry into the specifics of the conviction." *Garcia v. Attorney General*, 462 F.3d 287, 292 (3rd Cir. 2006), quoting *Singh v. Ashcroft*, 383 F.3d 144, 148 (3rd Cir. 2004). Therefore, we may look to the record of conviction to determine whether the respondent's conviction for stalking can be categorized as a "crime of stalking" under section 237(a)(2)(E)(i). The record of conviction includes the charging document, plea, verdict or judgment and sentence. See *Matter of*

Ajami, 22 I&N Dec. 949, 950 (BIA 1999). It does not, however, include the police report. *See Matter of Teixeira*, 21 I&N Dec. 316, 319 (BIA 1996). The information in this case indicates that the respondent was initially charged with aggravated stalking under section 784.048(3) of the Florida statutes. The language in the information charging the respondent with one count of aggravated stalking tracks the language contained in section 784.048(3) of the Florida statutes. However, the conviction documents do not establish that the respondent pled to the facts contained in the complaint or the information. Rather, the judgment reveals that the respondent pled guilty to a reduced charge of stalking under section 784.048(2) of the Florida statutes. Without more, the record contains insufficient information to prove that the respondent was convicted of willfully, maliciously and repeatedly "harassing" rather than "following" another person. Therefore, we agree with the respondent that the DHS has not established by clear and convincing evidence that the respondent was convicted of a "crime of stalking" within the meaning of section 237(a)(2)(E)(i) of the Act.

Nevertheless, the respondent is subject to removal under section 237(a)(1)(B) of the Act. The respondent asserts, however, that the Board erred in denying his request to remand the proceedings to the immigration court to allow him to seek adjustment of status and that proceedings should now be remanded for that purpose. The DHS opposes a remand of the proceedings. We find no error in our earlier

determination that the respondent did not warrant a remand of the proceedings based on evidence that he had married a United States citizen following the immigration judge's decision where the respondent failed to comply with *Matter of Velarde*, supra, by presenting clear and convincing evidence indicating a strong likelihood that the marriage is bona fide, and he also failed to submit a properly executed adjustment application although the Department of Homeland Security indicated its opposition to the respondent's motion. See *Matter of Yewondwosen*, 21 I&N Dec. 1025 (BIA 1997); *Matter of Ige*, 20 I&N Dec 880 (BIA 1994) (holding that the requirements for a motion to remand are for all practical purposes the same as those for a motion to reopen); 8 CFR section 1003.2(c)(1). The respondent has now proffered a completed adjustment application along with additional evidence. However, because we find that the evidence proffered is insufficient to establish a strong likelihood that the marriage is bona fide, we find that a remand of the proceedings to allow the respondent to seek adjustment of status is unwarranted.

The respondent also asserts that the proceedings should be remanded in order to allow him to apply for cancellation of removal under section 240(A)(b) of the Act, 8 USC section 1229b(b). A motion to remand r to reopen must, among other things, state the new facts to be considered at the reopened hearing and must be supported by affidavits or other evidentiary materials demonstrating prima facie eligibility for the relief sought. *See* 8 CFR section 1002.2(c)(1); *see*

also INS v. Abudu, 485 USC 94 (1988); *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). An alien who seeks to remand or to reopen proceedings to pursue relief bears a heavy burden of proving that if proceedings were remanded or reopened, with all the attendant delays, the new evidence would likely change the result in the case. *Matter of Coelho*, supra. We find that the respondent has not demonstrated prima facie eligibility for cancellation of removal where the evidence proffered by the respondent does not establish a prima facie case that his removal would result in exception al and extremely unusual hardship to his United States citizen wife. We note that the respondent's marriage is of short duration, less than 18 months, and was entered into several months after the immigration judge's decision ordering the respondent removed from the United States and after he was placed in detention. Although the respondent has proffered medical records for his wife, neither of the statements proffered by his wife address her medical problems or discuss any hardship which would result to her if the respondent were removed from the United States. Because the respondent has not demonstrated prima facie eligibility for cancellation of removal, a remand to allow him to apply for that form of relief is unwarranted. Moreover, we find that a remand would not be warranted in the exercise of discretion. The respondent was convicted of manslaughter in Canada on December 18, 1978. Although the respondent has been in the United States for more than a decade, he has a conviction for stalking and he was arrested for contempt of court in September 2005. The

respondent's wife reports in her written statement that she once had a restraining order filed against the respondent. We find that the record does not establish that reopening would be warranted in the exercise of discretion. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed, and the motion to remand is denied.

Edward R. Grant
FOR THE BOARD